Supreme Court, U.S.
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86-191

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH L. THOMAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a violation of Rule 6(d) of the Rules of Criminal Procedure that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial waived following a conviction by the petit jury?

2. Can the Seventh Circuit negate the *mens rea* requirements of 26 U.S.C. sections 7203 and 7205 by requiring that any good faith defense must be objectively reasonable?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	19

APPENDIX

A— Seventh Circuit Opinion of April 17, 1986 ...	A.1
B— Seventh Circuit Order of June 6, 1986	B.1
C— Defendant's Proposed Defense Instructions ...	C.1
D— Trial Court's *Sua Sponte* Modifications of Defendant's Proposed Instructions	D.1

TABLE OF AUTHORITIES

	PAGE
Battjes v. United States, 179 F.2d 1 (C.A. 6, 1949) .	17
Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1913)	13
Costello v. United States, 350 U.S. 359 (1956) ...	8
Hagler v. United States, 172 F.2d 986 (C.A. 10, 1949)	17
Liparota v. United States, ___ U.S. ___, 105 S.Ct. 2084 (1985)	18
Mann v. United States, 319 F.2d 404 (C.A. 5, 1963), *cert. denied*, 375 U.S. 986 (1964)	17
Stirone v. United States, 361 U.S. 212 (1960) ..	7
Tumey v. Ohio, 273 U.S. 510 (1927)	13
United States v. Aitken, 755 F.2d 188 (C.A. 1, 1985)	16, 17
United States v. Bishop, 412 U.S. 346 (1973) ..	16
United States v. Burton, 737 F.2d 439 (C.A. 5, 1984)	16, 17
United States v. Chanen, 549 F.2d 1306 (C.A. 9, 1977)	15
United States v. Dionisio, 410 U.S. 1 (1973) ..	6
United States v. Dondich, 460 F.Supp. 849 (N.D. Cal. 1978)	13
United States v. Echols, 542 F.2d 948, *cert. denied*, 431 U.S. 904 (C.A. 5, 1977)	13
United States v. Fields, 592 F.2d 638 (C.A. 2, 1978)	8

United States v. Hogan, 712 F.2d 757 (C.A. 9, 1983) 8

United States v. Ingredient Technology Corp., 698 F.2d 88 (C.A. 2, 1983), *cert. denied*, 103 S.Ct. 3111 (1983) 17

United States v. Kilpatrick, 594 F.Supp. 1324 (D.C. Colo. 1984) 7

United States v. Mandel, 415 F.Supp. 1033 (D. Md. 1976), *affirmed in part and vacated and remanded in part*, 591 F.2d 1347 (4th Cir. 1979) . 14

United States v. Mechanik, 474 U.S. ____, 106 S.Ct. 938 (1986) 5, 6, 7, 15

United States v. Murdock, 290 U.S. 389 (1933) .. 16

United States v. Phillips, 775 F.2d 262 (C.A. 10, 1985) 16, 17, 18

United States v. Pino, 718 F.2d 523 (C.A. 10, 1983) 7

United States v. Pomponio, 429 U.S. 10 (1976) .. 16

United States v. Samango, 450 F.Supp. 1097 (D. Hawaii 1978), *affirmed*, 607 F.2d 827 (C.A. 9, 1979) 13, 15

United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) 7

United States v. Treadway, 445 F.Supp. 959 (N.D. Texas 1978) 13

United States v. Ware, 608 F.2d 400 (C.A. 10, 1975) 17

Vasquez v. Hillery, 474 U.S. ____, 106 S.Ct. 617 (1986) 8

Yarborough v. United States, 230 F.2d 56 (C.A. 4, 1956), *cert. denied*, 351 U.S. 969 (1956) 17

U.S. CONSTITUTION

Amendment 5 ..... 2, 7, 8, 12, 15, 16

Amendment 16 12

TITLE 18 U.S.C.

Rule 6(d) 2, 5, 6, 7, 12, 13

TITLE 26 U.S.C.

§ 7203 ..... 1, 3, 18

§ 7205 ..... 1, 3, 18

ABA Standards For Criminal Justice, "The Prosecution Function" Std. 3-3.5 (2nd ed. 1980) 11

President's Cost Control Commission, "The President's Private Sector Survey On Cost Control (1984) 9, 10, 12

U.S. Attorney's Manual, Section 9-11.334 14

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The petitioner, Kenneth L. Thomas (Thomas), requests that a writ of certiorari issue to review the opinion of the Seventh Circuit Court of Appeals, which affirmed in part and reversed in part his conviction on seven income tax offenses: failure to file returns for 1979 through 1982 (26 U.S.C. section 7203); filing false employee withholding allowance certificates on October 13, 1982, and on January 19, 1984 (26 U.S.C. section 7205).

This appeal is of critical importance to the jurisprudence of the Seventh Circuit, which stands virtually alone among the circuits as requiring that any good faith defense to income tax charges must be objectively reasonable. This appeal challenges the validity of that requirement as well as the superseding indictment in view of the violations of Rule 6(d).

OPINION BELOW

The opinion below is published at 788 F.2d 1250 (Appendix A). Its order of June 6, 1986, denying the petition for rehearing and modifying its earlier decision is incorporated in its published opinion (Appendix B).

JURISDICTION

The judgment of the Seventh Circuit was entered on April 17, 1986 (A.1). The court denied Thomas' petition for rehearing with suggestion for rehearing "en banc" on June 6, 1986 (B.1). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT 5

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

TITLE 18 UNITED STATES CODE

RULE 6(d)

> Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or oper-

ator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

TITLE 26, UNITED STATES CODE

SECTION 7203 (1982)

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

SECTION 7205 (1982)

Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in lieu of any other penalty provided by law (except the penalty provided by section 6682), upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

Thomas is a field engineer for the IBM Corporation (IBM) and has been so employed since 1968 (T.236).[1] Although Thomas had filed income tax returns for a number of years, he never thought that he had a legal obligation to do so (T.237). He began to study this subject in 1974 or 1975 and by 1979, had concluded that he was not required to file returns at all, or to have taxes withheld from his salary (T.256-57).

1. Thomas was indicted on March 19, 1984 (R.1), charged with failing to file income tax returns for 1979, 1980 and 1981. On October 1, 1984, the grand jury returned a superseding indictment, alleging in addition to those charges, the failure to file returns for 1982 and 1983 plus the submission of false and fraudulent employee withholding allowance certificates (Forms W-4) on October 13, 1982, and on January 19, 1984 (R.39).

Thomas moved to dismiss the superseding indictment prior to trial because of prosecutorial misconduct before the grand jury (R.54). The motion set forth cumulative abuse comprised of questioning calculated to prejudice the grand jurors, characterizations and conclusions by one of the prosecutors of the testimony Thomas offered to the grand jury and refusing to afford Thomas the opportunity to complete his presentation to the grand jurors.

The motion further alluded to the actions of one of the prosecutors which amounted to him acting as a witness

[1] R. refers to record on appeal; T. refers to the trial transcript; A., B., C., D. refers to the respective appendices.

before the grand jury. The cumulative effect of these actions was to create a biased grand jury in violation of Rule 6(d) of the Rules of Criminal Procedure.

The district court denied this motion without expressing any reasons for its denial (R.60). The court of appeals affirmed the district court, basing its decision on a misapplication of this Court's opinion in *United States v. Mechanik*, 474 U.S. ____, 106 S.Ct. 938 (1986) (A.4).

2. Thomas defended this case on the basis that he lacked the requisite *mens rea* necessary to sustain a conviction on any of the alleged offenses. Thomas testified as to his beliefs concerning the filing of income tax returns and the filing of "exempt" Forms W-4. Thomas tendered jury instructions concerning his subjective beliefs and their effect on the element of willfulness (C.1, 2 and 3).

The trial court refused, over the defendant's objection (T.364-76) to give subjective intent instructions (T.390-99). It then, *sua sponte* modified two defense instructions (C.1 and C.3) by adding an objective qualification to them; the court required the jury to find that the defendant's beliefs were reasonable before it could acquit him (D.1, 2) and refused to give the other proposed instruction (C.2).

When the trial court actually instructed the jury, it misread its modified instruction by telling the jurors that if they found that Thomas':

> good faith was reasonable and not the result of negligence or inadvertent conduct of Mr. Thomas, then you must find Mr. Thomas not guilty.

(T.438-39). Although the defendant objected to this further denigration of the law relating to the defense, the trial judge further minimized the significance of this instruction when it was correctly re-read to the jury (T.449).

REASONS FOR GRANTING THE WRIT

1. In holding that procedural errors before the grand jury do not require the reversal of a conviction by the petit jury, the court below was misapplying this Court's decision in *United States v. Mechanik*, 474 U.S. ____, 106 S.Ct. 938 (1986) and misconstruing the Defendants' due process challenge to the prosecution's conduct before the grand jury.

Thomas' challenge was to the bias of the grand jury which resulted from prosecutorial misconduct which in turn effected its charging decision. This Court's decision in *United States v. Mechanik, Id.*, does not stand for the proposition that substantive errors of this nature cannot be a basis for reversal of a conviction by a petit jury.

Justice Rehnquist, writing for the majority, made it clear that the nature and extent of the court's holding was determined by the particular procedural history of that case. *Id.*, at 106 S.Ct. 940. The Justice specifically noted that:

> We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial.

Id., at 941. The *Mechanik* decision also specifically refused to adopt as its holding, the "short answer" (A.3) posited by the lower court. *Id.*, at 943, n.2.

The most important function of the grand jury is to stand between government agents and the suspect as an unbiased evaluator of the evidence. *United States v. Dionisio*, 410 U.S. 1, 16-17 (1973). It must remain free, within Constitutional

and statutory limits, to operate independently of either the prosecuting attorney or the judge. *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983).

Thomas has the right to have the grand jury make the charge on its own judgment. This is a substantial right which cannot be taken away. *Stirone v. United States*, 361 U.S. 212, 218-19 (1960). Where as here, there has been a significant infringement on the grand jury's ability to exercise independent judgment because of prosecutorial misconduct, the resulting indictment should be dismissed. *United States v. Pino*, 708 F.2d 523, 530 (C.A. 10, 1983); *United States v. Kilpatrick*, 594 F.Supp. 1324 (D.C. Colo. 1984).

Thomas contended before trial, and in this appeal, that his substantive Fifth Amendment right to an unbiased grand jury was violated by the prosecution's misconduct before the grand jury. Thomas raised this challenge in a motion to dismiss the superseding indictment (R.54). The challenged misconduct directly effected the charging decision made in this case. The misconduct included violations of the independence of the grand jury and the improper presence of the prosecutors in the grand jury room to answer questions, to comment on and to characterize the evidence and to instruct the grand jury (erroneously at that) on the law.

The federal rules clearly envision that dismissal of the indictment is an appropriate remedy for violations of Rule 6(d). *Mechanik, id.*, at 944. Respect for the rule of law demands that improperly procured indictments be quashed even after conviction because "only by upsetting convictions so obtained can the ardor of prosecuting officials be kept within legal bounds and justice be secured . . ." *Mechanik, id.*, at 949 (Justice Marshall dissenting).

This Court reaffirmed that violations of substantive rights in the grand jury proceedings warrant reversal of

a petit jury's verdict in *Vasquez v. Hillery*, 474 U.S. ____, 106 S.Ct. 617 (1986). The petit jury's conviction is not controlling and does not cure all errors in grand jury proceedings. The petit jury's verdict does not speak to the misconduct which impermissibly infected the framing of the indictment and, consequently, the nature or very existence of the proceedings to come. *Vasquez, id.*, at 106 S.Ct. 623.

The grand jury convenes as a body of lay persons acting in secret, duty bound to indict no one on account of prejudice or to refuse to indict anyone as a special favor. *United States v. Hogan*, 712 F.2d 757 (C.A. 9, 1983). Its protection of individuals from government was deemed so essential to basic liberties that it was incorporated in the Fifth Amendment of the Constitution. *Costello v. United States*, 350 U.S. 359 (1956). The conduct of the prosecutors before the grand jury in this case made a mockery of the whole institution, violated Thomas' due process rights and should have resulted in dismissal of the indictment.[2]

Thomas moved to dismiss the superseding indictment prior to trial because of these prosecutorial abuses (R.54). Generally, dismissal of an indictment is justified to achieve either of two objectives: to eliminate prejudice to a defendant; or, pursuant to the court's supervisory power, to prevent prosecutorial impairment of the grand jury's independent role. *Hogan, id.*, at 712 F.2d 761; *United States v. Fields*, 592 F.2d 638, 647 (C.A. 2, 1978). When the instances of conduct before the grand jury in this case are viewed cumulatively, both objectives are implicated here.

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[2] The complete transcript of the October 1, 1984 proceedings was filed as a Supplemental Appendix. SA refers to pages of that transcript.

There is initially a real question as to the bona fides of Special Agent Thalman's testimony. He stated that he had conducted an investigation of Thomas for the years 1982 and 1983 subsequent to the initial testimony of Special Agent Gosik on March 12, 1984 (SA 2, 5-6). One of the grand jurors questioned why this information had not been discovered prior to the first indictment, especially as to 1982 (SA 9).

Thalman then contradicted his own testimony and stated that for the 1982 year, his report was in the administrative process, a procedure that could not have transpired between March 12th and October 1st, 1984 (SA 9-10). Thalman did not tell the grand jury the truth about his investigation.

Thomas was the next and the last witness to testify (SA 11-26). It soon became obvious that this grand jury has lost any degree of impartiality it was supposed to have. Thomas was advised by the foreperson, prior to beginning his testimony, that they had a limited amount of time to hear him because they were scheduled for another attorney (SA 13). There can be no independent investigation when the time is controlled by the prosecutor's office. The grand jury should have been more concerned about the substantive rights of the Defendant than the schedule of the U.S. Attorney's office.

Thomas first tried to correct the misimpression that many people have concerning income taxes, namely that the government would collapse without them (SA 13). He also tried to overcome the inherent prejudice against people who do not pay their so-called "fair share."

Thomas related to the grand jury the finding of the "President's Private Sector Survey on Cost Control (the Grace Report)," dated January 12, 1984 that all individual

income tax revenues are gone before a single cent is spent on the services which taxpayers expect from their government.

According to the Grace Report 100% of the individual income tax revenues collected by the government are spent on interest on the federal deficit and on federal contributions to transfer payments; not a single cent is spent on government services.

The prosecution attempted to counter this fact by inflaming the passions and prejudices of the grand jury on this precise issue. They did so by questioning Thomas on an irrelevant subject based upon the prosecutor's mistaken beliefs as to the facts:

Q. You were being paid while you were in the Navy?

A. Yes.

Q. And you received training? You were receiving training?

A. Yes.

Q. That has allowed to advance you in your career?

A. And also—

Q. Excuse me. Just let me finish. Correct?

A. Yes.

Q. And you didn't pay for that, right? You didn't pay for the training? You didn't pay tuition?

A. In reality I did pay for it.

Q. No, but did you pay any money as if you had gone to college? Did you pay anybody tuition?

A. No, I don't think this is the question here. I think the question you are bringing up has nothing to do with the matter at hand. The matter at hand was in 1982 and 1983 was I a person

required under the Internal Revenue Code to fill out a tax return and to pay an income tax return on wages or compensation which is clearly exempt from income tax, and I think you are confusing the issues here, Mr. Sanchez, I really do.

Q. Okay, but back then you were in the Navy receiving this training and getting paid for it and you weren't paying tuition?

A. That's right.

Q. Was tax money being used by the Navy to train you?

A. I'm sure it was.

MR. SANCHEZ: I have no further questions.

(SA at 24-25). While tax money was obviously used by the Navy, the fact of the matter is that it is not the individual income tax which pays for the Navy. The prosecution harped on this same theme throughout its questioning of Thomas (SA 21, 22, 23). The prosecutor well knew that in a criminal tax prosecution for failure to file returns, the payment of the tax and any civil liability is totally irrelevant. He would not have been allowed to question Thomas in such a fashion before the petit jury.

The prosecution is ethically precluded from making statements or arguments in an effort to influence grand jury action in a manner which would be impermissible at trial. *ABA Standards For Criminal Justice*, "The Prosecution Function" Std. 3-3.5 (2nd ed. 1980). Nevertheless, more of this type of abuse transpired at the afternoon session.

But before that, Thomas attempted to present further information to establish that there had been no voluntary, intentional violation of any known legal duty. He was prohibited from doing so because another prosecutor wanted to present information concerning another matter (SA 28).

Thomas continued with his presentation, but was interrupted by one of the prosecutors (SA 26). Thomas tried to leave some exhibits for the grand jury to review, but was not given any opportunity to explain those exhibits and how they effected his beliefs (SA 26).

The afternoon session was in reality the commencement of the grand jury's deliberations on the information they had heard. In violation of Rule 6(d), both prosecutors remained in the room to answer questions, to give advice and to comment on the evidence (SA 28-31).

For example, one juror asked if Thomas' interpretation of the law was correct (SA 28). One of the prosecutors responded by giving his own opinion as to what Thomas had said; he then proceeded to address himself to the legal sufficiency of Thomas' theories (SA 28-29). Neither he nor his colleague had been qualified to act as a legal advisor to the grand jury (SA 1-33).

The foreperson asked if the prosecutors were saying that Thomas' theories had been tested in the Court of Appeals and had been found to be an incorrect statement of the law (SA 29). In the guise of answering this and follow-up questions, the prosecutors presented vague and ambiguous evidence to the grand jury and thereby violated the due process clause of the Fifth Amendment as well as Rule 6 by acting as witnesses.

Another juror raised a question about the Grace Commission's findings (SA 31). The prosecutors falsely stated that various Courts of Appeals have held the Grace Commission's findings to be irrelevant (SA 31). They then proceeded to instruct the jury on the law concerning the construction of the Sixteenth Amendment (SA 30-31). Those instructions were not only improper, they were also incorrect (SA 31-32). The Sixteenth Amendment in fact gave

the federal government no new taxing powers. *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1913).

When the prosecutors stepped out of their role as prosecuting attorneys and into the role of legal advisors and witnesses, they became unauthorized persons before the grand jury. Their presence was therefore "per se" grounds for quashing the superseding indictment. *United States v. Echols*, 542 F.2d 948, *cert. denied*, 431 U.S. 904 (C.A. 5, 1977); Rule 6(d).

A prosecutor cannot act as a witness or give evidence in the guise of responding to questions. *United States v. Dondich*, 460 F.Supp. 849 (N.D. Cal. 1978); *United States v. Treadway*, 445 F.Supp. 959 (N.D. Texas 1978). If he or she does, any resulting indictment should be dismissed. The one-sided nature of the grand jury process does not justify dual roles for the government attorneys; it presents all the more reason for its avoidance. *Tumey v. Ohio*, 273 U.S. 510 (1927).

The prosecutor's responses also amounted to an expression of his opinion on the sufficiency of the evidence, at least as to the sufficiency of Thomas' evidence as a defense to the charges presented. This is also enough to warrant dismissal of the indictment. *United States v. Samango*, 450 F.Supp. 1097 (D. Hawaii 1978), *affirmed*, 607 F.2d 827 (9th Cir. 1979).

The prosecutor's instructions on the law were misleading as well as inappropriate and were another basis for dismissing this indictment. As stated, neither prosecutor had been authorized to act as legal advisor to the grand jury. These actions eroded the independent assessment of the evidence by the grand jury.

Yet another abuse of the grand jury process is evidenced by the prosecutors' failure to present exculpatory

evidence which negated the *mens rea* element of the offenses sought.

Special Agent Thalman, for example was not asked about the series of letters Thomas had written him since his initial interview on November 17, 1981. The prosecutors neglected to mention that Thalman had not responded to any of those letters; that Thomas was trying to clarify exactly what his duties were but that the IRS refused to answer any of his questions; that the IRS refused to provide a meaningful response to his inquiries.

The prosecution neglected to mention that Thomas had believed so strongly in his position that he filed for refunds on all income taxes paid and that, when the IRS failed to respond within six months, Thomas filed a suit for refund in the district court.

Department of Justice policy requires prosecutors to present "substantial evidence" known to the prosecutor "which directly negates guilt." U.S. Attorney's Manual, Section 9-11.334.

Some courts have expressed the view that dismissal is appropriate if exculpatory evidence which was not presented would have clearly negated guilt. *United States v. Mandel*, 415 F.Supp. 1033 (D. Md. 1976), *affirmed in part and vacated and remanded in part*, 591 F.2d 1347 (4th Cir. 1979). Dismissal is appropriate here when the failure to present exculpatory evidence is coupled with the abuses detailed in the preceding paragraphs.

Thomas returned for the afternoon session with his attorney. There was then an apparent discussion had off the record between one of the prosecutors and the grand jury (SA 33). A grand juror stated that "this should be on the record." Thomas had brought forth exculpatory materials to present, but the grand jury, under the crunch

of "business' from the U.S. Attorney's Office, had already voted (SA 33). It appears that the only aspect of the case that the grand jury considered in secret, was their vote. There could be no doubt as to its outcome after the overreaching by the prosecution.

Under our Constitution scheme, the grand jury is not and should not be captive to any of the three branches. *United States v. Chanen*, 549 F.2d 1306, 1312 (C.A. 9, 1977). If the grand jury is to accomplish either of its functions, independent determination of probable cause that a crime has been committed and protection of citizens against unfounded prosecutions, limits must be set on the manipulation of grand juries by overzealous prosecutors. *United States v. Samango, supra*, at 607 F.2d 882.

The grand jury was overreached in this case. Their investigation became a *pro forma* exercise with no substance whatsoever. The cumulative effect of the foregoing errors and indiscretions operated to Thomas' prejudice by producing a biased grand jury. The resulting indictment should have been quashed. *United States v. Samango, Id.*, at 607 F.2d at 884.

A writ of certiorari must issue to the Seventh Circuit to correct its misapplication of this Court's decision in *United States v. Mechanik, Id.* The cumulative abuse of the grand jury process in this case directly affected their changing decision. The due process clause of the Fifth Amendment mandates dismissal of the superseding indictment.

2. The Seventh Circuit's insistence on applying the objectively reasonable limitation on a good faith defense in criminal tax cases has the effect of negating the willful requirements of those statutes and amounts to a denial of equal protection of the laws in violation of the due

process clause of the Fifth Amendment. Its position in this regard is in direct conflict with *United States v. Murdock*, 290 U.S. 389 (1933); *United States v. Bishop*, 412 U.S. 346 (1973), and *United States v. Pomponio*, 429 U.S. 10 (1976).

The Seventh Circuit position is also in direct conflict with *United States v. Burton*, 737 F.2d 439 (C.A. 5, 1984); *United States v. Aitken*, 755 F.2d 188 (C.A. 1, 1985); *United States v. Phillips*, 775 F.2d 262 (C.A. 10, 1985).

This Court, in *United States v. Murdock*, described the specific intent of willfulness as follows:

> He whose conduct is defined as criminal is one who "willfully" fails . . . to make a return. Congress did not intend that a person by reason of a bona fide misunderstanding as to his . . . duty to make a return . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct.

290 U.S. at 396. In *United States v. Bishop*, this Court held that the element of willfulness is the same in all federal tax offenses, whether felonies or misdemeanors. In so holding, the Court observed that:

> the word "willfully" in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty.

412 U.S. at 360.

The court emphasized this point in *United States v. Pomponio*, where it stated that:

> . . . willfulness in this context simply means a voluntary, intentional violation of a known legal duty.

429 U.S. at 12. Following these decisions, six courts of appeals either explicitly or implicitly required proof of subjective intent to disobey the requirements of the tax stat-

ute at issue in order to establish that the Defendant acted with the requisite intent: First Circuit—*United States v. Aitken, supra*; Second Circuit—*United States v. Ingredient Technology Corp.*, 698 F.2d 88, 97, *cert. denied*, ____ U.S. ____, 103 S.Ct. 3111 (1983); Fourth Circuit—*Yarborough v. United States*, 230 F.2d 56, 61, *cert. denied*, 351 U.S. 969 (1956); Fifth Circuit—*United States v. Burton, supra*; *Mann v. United States*, 319 F.2d 404, 409-10 (1963), *cert. denied*, 375 U.S. 986 (1964) (court found an instruction that invited the jury "to speculate as to what any other person . . . would reasonably have expected to be the consequence of [his] conduct" to be plain error); Sixth Circuit—*Battjes v. United States*, 179 F.2d 1, 4 (1979) (a bona fide misconception of the law is a defense to failure to file regardless of the general presumption that one knows the law); Tenth Circuit—*United States v. Phillips, supra*; *Hagler v. United States*, 172 F.2d 986, 989 (1949); *United States v. Ware*, 608 F.2d 400, 405 (1975) In these circuits, the prosecution must prove the subjective intent of the accused, i.e., that the proscribed act or omission was committed voluntarily and intentionally, with knowledge of its illegality.

The opinion below has the effect of nullifying the willful requirement by requiring that any good faith misunderstanding of the law must be objectively reasonable before it can be a defense (A.6-7). In the First and Fifth Circuits, it is plain error to limit the good faith defense in such a manner. See *Mann v. United States, supra*, at 319 F.2d 409-10 and *United States v. Aitken, supra*, at 755 F.2d 194.

The Seventh Circuit's rejection of the subjective test means that in criminal tax trials in that circuit, the trier of fact must judge whether or not the accused acted as a reasonably prudent man, instead of judging the *mens*

rea of the accused. As this Court recently observed in another reversal of the Seventh Circuit, criminal offenses requiring no *mens rea* have a generally disfavored status. The failure of Congress to indicate whether *mens rea* is required does not signal a departure from this *grundnorm* of our criminal law. *Liparota v. United States*, ____ U.S. ____, 105 S.Ct. 2084 (1985) at 2088.

Congress explicitly indicated that an accused must act willfully to be guilty of violating the statutes at issue in this prosecution. 26 U.S.C. §§ 7203, 7205.

The Defendant tendered instructions which were premised upon his subjective intent and his good faith beliefs (C.1, 2, 3). The trial court "*sua sponte*" removed the subjective language and replaced it with "reasonable" qualifications (D.1, 2), thereby removing the subjective element from the case.

This error was compounded by the district court's misreading of its modified instruction (A.6) which must have had the effect of thoroughly confusing the jury as to the correct instruction.

Thomas made timely objections to the trial court's instruction (T.374-75, 453). Nevertheless, the court of appeals erroneously concluded not only that timely objections had not been made, but also that Thomas had tendered the instructions at issue (A.7). These conclusions are not supported by the record.

The court below did observe that two other courts have disagreed with their objectively reasonable standard (A.7). In fact, as the Tenth Circuit recognized, the Seventh Circuit stands virtually alone in its insistence on an objectively reasonable limitation to the good faith defense. *United States v. Phillips, supra*, at 755 F.2d 264.

Such an instruction is plain error in the First and Fifth Circuits yet it is consistently used to instruct juries in the Seventh Circuit. This Court must issue the writ to end this denial of due process in the Seventh Circuit.

CONCLUSION

For these reasons, the petition for writ of certiorari must be granted.

Respectfully submitted,

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Dated: August 5, 1986

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2120

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH L. THOMAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 CR 222—**Thomas R. McMillen,** *Judge.*

ARGUED FEBRUARY 24, 1986—DECIDED APRIL 17, 1986

Before CUDAHY and EASTERBROOK, *Circuit Judges,* and FAIRCHILD, *Senior Circuit Judge.*

EASTERBROOK, *Circuit Judge.* From 1966 through 1976 Kenneth L. Thomas filed tax returns. Then he stopped, claiming that he had no tax liability. He filed a form informing his employer that he had 23 withholding allowances, which dramatically reduced the tax his employer withheld. He ceased filing returns.

An indictment filed March 19, 1984, charged Thomas with wilfully failing to file tax returns for the tax years 1979, 1980, and 1981, in violation of 26 U.S.C. §7203. A superseding indictment filed October 1, 1984, retained these three charges and added four more: failing to file

tax returns for 1982 and 1983, and wilfully filing false certificates asking his employer to cease all withholding on the ground that he is "exempt" from taxation, in violation of 26 U.S.C. §7205. The 1983 return was due after the filing of the first indictment. The trial began on January 15, 1985, and the jury convicted Thomas on all counts. The district court sentenced Thomas to a total of four years' imprisonment and fined him $22,000. As the time sequence suggests, the principal problem is one of compliance with the Speedy Trial Act, 18 U.S.C. §3161 et seq. Before considering this problem, we clear out the underbrush.

I

1. Thomas is a tax protester, and one of his arguments is that he did not need to file tax returns because the sixteenth amendment is not part of the constitution. It was not properly ratified, Thomas insists, repeating the argument of W. Benson & M. Beckman, *The Law That Never Was* (1985). Benson and Beckman review the documents concerning the states' ratification of the sixteenth amendment and conclude that only four states ratified the sixteenth amendment; they insist that the official promulgation of that amendment by Secretary of State Knox in 1913 is therefore void.

Benson and Beckman did not discover anything; they rediscovered something that Secretary Knox considered in 1913. Thirty-eight states ratified the sixteenth amendment, and thirty-seven sent formal instruments of ratification to the Secretary of State. (Minnesota notified the Secretary orally, and additional states ratified later; we consider only those Secretary Knox considered.) Only four instruments repeat the language of the sixteenth amendment exactly as Congress approved it. The others contain errors of diction, capitalization, punctuation, and spelling. The text Congress transmitted to the states was: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to

any census or enumeration." Many of the instruments neglected to capitalize "States," and some capitalized other words instead. The instrument from Illinois had "remuneration" in place of "enumeration"; the instrument from Missouri substituted "levy" for "lay"; the instrument from Washington had "income" not "incomes"; others made similar blunders.

Thomas insists that because the states did not approve *exactly* the same text, the amendment did not go into effect. Secretary Knox considered this argument. The Solicitor of the Department of State drew up a list of the errors in the instruments and—taking into account both the triviality of the deviations and the treatment of earlier amendments that had experienced more substantial problems—advised the Secretary that he was authorized to declare the amendment adopted. The Secretary did so.

Although Thomas urges us to take the view of several state courts that only agreement on the literal text may make a legal document effective, the Supreme Court follows the "enrolled bill rule." If a legislative document is authenticated in regular form by the appropriate officials, the court treats that document as properly adopted. *Field v. Clark*, 143 U.S. 649 (1892). The principle is equally applicable to constitutional amendments. See *Leser v. Garnett*, 258 U.S. 130 (1922), which treats as conclusive the declaration of the Secretary of State that the nineteenth amendment had been adopted. In *United States v. Foster*, No. 85-1925 (7th Cir. Apr. 10, 1986), slip op. 10-12 & n.6, we relied on *Leser*, as well as the inconsequential nature of the objections in the face of the 73-year acceptance of the effectiveness of the sixteenth amendment, to reject a claim similar to Thomas's. See also *Coleman v. Miller*, 307 U.S. 433 (1939) (questions about ratification of amendments may be nonjusticiable). Secretary Knox declared that enough states had ratified the sixteenth amendment. The Secretary's decision is not transparently defective. We need not decide when, if ever, such a decision may be reviewed in order to know that Secretary Knox's decision is now beyond review.

2. Thomas testified before the grand jury that returned the superseding indictment. He presented his explanations for not paying taxes, including his belief that wages are not income and an assertion that "all individual income tax revenues are gone before one nickel is spent on the services which taxpayers expect from their Government." In response to questions asked by the prosecutor, Thomas conceded that he had received technical training paid for by the Navy, payment funded by taxes. Thomas maintains that the indictment should be dismissed because of these questions, which he says are improper; because the prosecutor failed to present the grand jury with exculpatory evidence (other than Thomas's own testimony); and because the prosecutor advised the grand jurors that Thomas's legal theories are incorrect.

The short answer is that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956) (footnote omitted). See also *United States v. Calandra*, 414 U.S. 338, 344-45 (1974). A somewhat longer answer is that even if the district court should have required the prosecutor before trial to obtain a fresh indictment, there is no reason to restart the process now that there has been a trial and conviction. The grand jury is designed principally to prevent the prosecutor from subjecting innocent people to the burden and trauma of trial. The real "victims" of any abuse of the grand jury process are a subset of those who are indicted and acquitted at trial. We know now that Thomas was not tried unnecessarily. The Supreme Court held in *United States v. Mechanik*, 106 S. Ct. 938 (1986), that procedural errors before the grand jury do not require the reversal of a conviction by the petit jury. See also *United States v. Burke*, 781 F.2d 1234, 1245 (7th Cir. 1985); *United States v. Roth*, 777 F.2d 1200, 1203-06 (7th Cir. 1985); *United States v. Murphy*, 768 F.2d 1518, 1533-34 & n.2 (7th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3562 (U.S. Feb. 24, 1986). The principle disposes of Thomas's contention.

3. This assumes, however, that the petit jury properly convicted Thomas, which he denies. He asserts that the evidence was insufficient. Not so. Thomas filed returns for at least ten years, so he knew of the tax laws. The IRS sent Thomas a letter in 1978 informing him of the need to file (and the penalties for not filing). He was a field engineer at IBM, obviously capable of understanding enough to act wilfully. He failed to file a tax return for 1983, even though this was due after the return of the first indictment. It is not for want of information that Thomas did not file. A jury was entitled to find his neglect wilful, as that term is used in tax law. *United States v. Pomponio*, 429 U.S. 10 (1976); *United States v. Copeland*, No. 84-2646 (7th Cir. Dec. 17, 1985). The false certificates claiming exemption were filed knowingly; Thomas's evidentiary position here is that because IBM (on the advice of the IRS) ignored his certificates, he cannot be convicted. Section 7205 forbids the filing of "false" forms, however, and reliance on the forms is not an element of the offense. *United States v. Lawson*, 670 F.2d 923, 928 (10th Cir. 1982).

Thomas relies on *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), which reversed a conviction for filing a claim of three billion exemptions. The employer in *Snider* was a Friends School; the taxpayer, a Quaker, objected to the use of taxes for war; the claim of exemption, transparently symbolic, was accompanied by Snider's explanation that as an objector to war he would not pay tax voluntarily but invited the government to levy on his bank account. Toleration of this form of symbolic speech does not help Thomas, who did everything within his power to deceive IBM and rid himself of tax.

4. The district court gave the following instructions on the meaning of wilful conduct and the defense of good faith misunderstanding.

> When the word "wilfully" is used in these instructions, it means the voluntary and intentional violation of a known legal duty. The failure to act is wilfully

done if done voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently or negligently.

The requirement that an offense be committed "wilfully" is not met if a taxpayer in fact relied in good faith on a prior decision of the United States Supreme Court which was known to him and of [sic] his reliance was reasonable.

A good faith misunderstanding of the law based on reasonable grounds may negate wilfulness. . . .

Defendant has testified as to his beliefs concerning the filing of income tax returns and the filing of exempt Forms W-4. If you find that these beliefs were the result of a good faith misunderstanding of the law and that his good faith was reasonable and not the result of negligence or inadvertent conduct of Mr. Thomas, then you must find Mr. Thomas not guilty.

. . .

Defendant has testified as to his beliefs concerning the filing of income tax returns and the filing of exempt Forms W-4. If you find that these beliefs were the result of a good faith misunderstanding of the law and that his good faith was reasonable, then you must find Mr. Thomas not guilty. Alternatively, if you find that his conduct was negligent or inadvertent, then you must also find him not guilty.

The last two instructions are two versions of an instruction proposed by Thomas—the second one the accurate version, the first a misreading that the court corrected by giving the second. Thomas says that the correction was confusing, but we do not think so. The jury ended up with the correct instruction.

His principal contention is that all of the wilfulness instructions are flawed because they afford a defense of "good faith misunderstanding" only to one whose belief is "reasonable." This objective component was approved in *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980),

cert. denied, 450 U.S. 916 (1981), which observed that a mistake-of-law defense should be confined within exceptionally narrow bounds. Two other courts have disagreed with *Moore*. *United States v. Phillips*, 775 F.2d 262, 264 (10th Cir. 1985); *United States v. Aitken*, 755 F.2d 188, 191-93 & n.2 (1st Cir. 1985).

Since *Aitken* disagreed with *Moore*, defendants have asked us to abandon the standard of that case. We have twice declined to revisit *Moore* when the defendant did not adequately press an objection in the district court. *United States v. Bressler*, 772 F.2d 287, 290 (7th Cir. 1985); *United States v. Witvoet*, 767 F.2d 338, 339 (7th Cir. 1985). See also *United States v. Anton*, 683 F.2d 1011, 1018 (7th Cir. 1982) (following *Moore*). We decline again today. The "reasonableness" requirement appeared in the instruction that Thomas himself proposed. And when the district court was discussing its own wilfulness instruction, it asked: "Is that [the instruction] agreeable?", to which Thomas's counsel replied "It is agreeable, your Honor." After the jury retired to consider its verdict Thomas moved for a mistrial, relying in part on an objection to the wilfulness instruction, but this objection came too late under Fed. R. Crim. P. 30. *Bressler* and *Witvoet* hold that, no matter the status of *Moore*, instructions like the ones given here are not plain error.

II

The most difficult questions come from the time that lapsed between the indictments and the trial. The superseding indictment, which was filed on October 1, 1984, does not pose a serious problem. Thomas appeared and pleaded to the four new charges in this indictment on October 9, 1984; his trial began 97 days later, on January 15, 1985. The Speedy Trial Act allows 70 days from appearance within which to get the trial underway, 18 U.S.C. §3161(c)(1), less any excludable time. At least 27 days between October 9 and January 15 were excludable for reasons discussed below, and so the trial on the superseding indictment was timely.

Things are otherwise for the three charges contained in the original indictment, filed March 19, 1984. Thomas appeared before a judicial officer on March 26, 1984, and it took 295 days to bring these charges to trial. The government contends that all but 19 were excludable. Its position seems to be that everything necessary to prepare the case for trial must produce excludable time—that the 70 days refers only to time when everyone was twiddling his thumbs. That is not so. The statute requires the government to do all of the things ordinarily necessary to get a case to trial within the 70 days; only a few categories of time are excludable. Thomas, on the other hand, contends that almost none of the time is excludable. The parties having done little to narrow their dispute, we review the course of events.

The time started on March 26, 1984. On April 9, 1984, the magistrate set a briefing schedule for the filing of pretrial motions. This brought into play the holding of *United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985), that if a party requests an allocation of time within which to prepare and file motions, the ensuing time is excludable under 18 U.S.C. §3161(h)(1). The time to prepare motions is not covered by §3161(h)(1)(F), which excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion". But the statute allows judges to exclude extra time if necessary to accommodate complex or unusual motions. 18 U.S.C. §3161 (h)(8)(B)(ii). The legislative history of the 1979 amendments to the Speedy Trial Act demonstrates that §3161(h)(8)(B)(ii) may be used to afford extra time for the preparation of complex motions as well as for their disposition. See S. Rep. No. 96-212, 96th Cong., 1st Sess. 34 (1979). *Tibboel* relied principally on the fact that §3161(h)(1) begins by reciting that excludable time includes "but [is] not limited to" the periods expressly provided; §3161(h)(8)(B)(ii) fortifies the conclusion of *Tibboel*.

Thomas then asked for and got a series of extensions within which to file his motions, and after the govern-

ment answered Thomas got a further extension to reply. All papers were on file by July 10, 1984, when a magistrate took the motions under advisement. This started the period of exclusion provided by §3161(h)(1)(J): "delay attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court." We held in *Tibboel* and *United States v. Janik*, 723 F.2d 537, 544 (7th Cir. 1983), that this exclusion—and not the more elastic "prompt disposition" proviso of §3161(h)(1)(F)—governs the period that may be excluded while a motion is under advisement. This, too, is strongly supported by the legislative history. See S. Rep. 96-212, *supra*, at 33-34; H.R. Rep. No. 96-390, 96th Cong., 1st Sess. 10-11 (1979).

The picture is complicated, however, by the fact that the statute refers to the "proceeding", as if there were bound to be only one, and "the court" as an institution rather than to a particular judicial officer. Thomas filed two motions to dismiss the indictment, three motions concerning discovery, and a motion to suppress evidence, six separate documents in all, over a period of weeks. The case then went to a magistrate and as we relate below to the judge. *Tibboel* and *United States v. Regilio*, 669 F.2d 1169, 1172-73 (7th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982), allow a court faced with multiple motions to take more than 30 days, without granting a continuance under §3161(h)(8)(B)(ii), which was how Congress expected the court to deal with complex matters. We recognized in *Tibboel* that other courts have enforced the 30 day limit even when there were multiple motions, but *Tibboel* and *Regilio* control here. Our problem then is now much time beyond 30 days is excludable in a case of this character.

The magistrate took the motions under advisement on July 10 and on August 1 issued a 17-page report and a recommendation to deny all six motions. The clock, stopped since April 9, commenced to run. The motions were no longer under active consideration, not unless the defendant objected to the recommendations, which under the local rules he had ten days to do. These ten days are not

automatically excluded; under *Tibboel* only time expressly granted by the court is excluded. Otherwise far too much time would be excluded, for in a sense every day that passes after the indictment is spent "preparing" things. The Speedy Trial Act sets 70 days as the limit on ordinary preparation. So on August 1 the clock started, just as it would have done if the judge rather than the magistrate had written the opinion. The difference is that the magistrate's recommendation was not final, which set the stage for a further exclusion if Thomas objected. (It may also have required a continuance under §3161(h)(8)(A) or (B)(ii) if the judge had overruled the maagistrate, for then the time spent preparing for trial on the assumption that the magistrate's recommendations would be adopted might be wasted. We need not consider this possibility further.)

The "if" came true on August 13, when Thomas filed objections. The prosecutor did not ask for time to respond; indeed the prosecutor did not respond. So as of August 13 the case was back under advisement, and the time was again subject to exclusion under §3161(h)(1)(J). But for how long? The magistrate had taken 22 days. Did this leave eight more for the judge, or did it start a new 30-day period (subject to "reasonable" increase because Thomas filed six motions)? The Eleventh Circuit—so far as we can tell, the only court that has considered this question—has held that the district judge has a full 30 days. *United States v. Mastrangelo*, 733 F.2d 793, 796 n.2 (11th Cir. 1984); *United States v. Mers*, 701 F.2d 1321, 1335-37 (11th Cir.), *cert. denied*, 464 U.S. 991 (1983). The court reasoned in *Mers* that the judge's 30 days is supposed to begin only after all of the preparatory activity (hearings and the like) has been completed and the time for that purpose exhausted under §3161(h)(1)(F). *Mers* treated the proceedings before the magistrate as time necessary to get the motions in position for consideration by the judge, and it therefore concluded that the judge has thirty days of his own to act. It found support in the Judicial Conference's *Guidelines to the Administration of the Speedy Trial Act*

of 1974 43 (1979), which state: "[W]hen a pretrial matter is considered by both a magistrate and a judge . . . the Committee believes that the [Speedy Trial Act] permits two thirty day periods for consideration of the same matter."

The statute, however, refers to 30 days' advisement by "the court" rather than by each judicial officer, and we hesitate to read "not to exceed thirty days" in §3161 (h)(1)(J) to permit an automatic exclusion of 60 days just because the judge seeks the advice of a magistrate. Magistrates are supposed to accelerate rather than retard the disposition of cases. The magistrate can turn to the case more quickly than the judge, who (aided by the magistrate's report) may concentrate on the remaining areas of dispute between the parties. If both judge and magistrate have 30 days, then in an ordinary case, with nothing more complex than a request for discovery of *Brady* materials, 60 days of automatic exclusion would be added to the 70 days provided by the Speedy Trial Act. We doubt that Congress meant to afford an all-but-automatic doubling of the statutory time. The Senate committee that recommended the 1979 amendments was worried that motions practice would subvert the time limits of the Act, and it was adament that "the Committee does not intend to permit circumvention of the 30-days, 'under advisement' provision contained in Subsection (h)(1)(J). Indeed, if motions are so simple . . . that they do not require a hearing, necessary advisement time should be considerably less than 30 days. Nor does the Committee intend that additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary." S. Rep. No. 96-212, *supra*, at 34. A judge with the report of a magistrate in hand does not need much time to act; in the rare event that the judge needs extra time, he may grant a continuance under §3161(h)(8)(A) or (B)(ii). The argument that the magistrate's efforts simply put the judge in the position to decide could be made equally well of the time consumed by the parties in preparing motions, or even of the time

consumed by the judge's law clerk in doing research. The Senate committee expressly rejected a proposal to exclude all time consumed in motions practice (*id.* at 33-34), and for the same reasons we think—at least tentatively—that "the court", which includes magistrates as well as judges, has only 30 days' excludable time under §3161(h)(1)(J).

We are tentative, however, for several reasons. First, the parties have not briefed this question adequately, and we hesitate to act without the advantage of more complete submissions. Second, even if we allow the district judge 30 days from August 13 in which to act, there are at least 70 non-excludable days elsewhere. Third, the Speedy Trial Act should be interpreted to allow precise computations of the remaining time, so that people may readily identify which cases are furthest advanced and need priority handling. It is undesirable for an appellate court to announce a surprise interpretation of the Act. Our discussion here, then, is a warning signal rather than a holding. Our initial encounter with the issue does not leave us convinced by the holding of *Mers*, but it does not produce a firm resolution the other way. There may be other arguments that have not come to our attention, and we are open to them at the proper time.

One thing is clear, however: A judge may not take advantage of both a second 30-day period and our holding in *Tibboel* that multiple motions may permit the exclusion of more than 30 days' time under advisement. A judge who has received the report of a magistrate is well on the way to decision. There is no need of a further enlargement past 30 days for the judge just because the magistrate may have wrestled with a complex set of motions. By the time the judge sees things, the wild beast has been tamed; 30 days is more than enough. (If for some exceptional reason 30 days will not do, the only appropriate recourse is an extension under §3161(h)(8)(A) or (B)(ii).) So the exclusion provided by §3161(h)(1)(J) expired no later than September 12, 1984, when the 30 days were up. The clock was running again.

The district judge adopted the magistrate's report in a four-page opinion on September 20, 1984. The superseding indictment was filed on October 1, and Thomas pleaded to the four new charges on October 9. The superseding indictment does not affect the running of the time on the three charges that were in the original indictment as well as the superseding indictment. 18 U.S.C. §3161(h)(6); *United States v. Rush*, 738 F.2d 497, 510-11 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 1355 (1985). On October 24 Thomas filed a request for extra time to submit new motions. The judge set a briefing schedule on October 29, so under *Tibboel* a new period of exclusion started.

On October 29 the district judge also issued a minute order stating: "Excludable delay due to filing of a superseding indictment began Oct. 1, 1984 and ends Oct. 31, 1984." The judge did not elaborate, but the parties assume that the judge meant to exclude time under §3161(h)(8)(A), which he may if "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." There are two problems. First, §3161(h)(8)(A) states that no period may be excluded "unless the court sets forth . . . its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." The cryptic notation "due to the filing of a superseding indictment" does not supply the necessary finding; the judge did not point to anything unusual about the case. Second, a court may not exclude time retroactively under §3161(h)(8)(A). *United States v. Janik*, *supra*, 723 F.2d at 545. The order of October 29 is therefore ineffectual. (We do not imply that the filing of a superseding indictment is never an appropriate occasion for exclusion of time under this section. If all parties would be better served by trying all counts together, it may be. But the district court did not give this reason, and at all events it acted belatedly.)

The briefing schedule set on October 29 called for Thomas to file his motions by November 2 and gave the prosecutor until November 9 to respond. Thomas did not comply

with this schedule. Instead he filed a series of motions, mostly duplicating motions filed before but adding a motion based on misconduct before the grand jury. The last was filed on November 13, 1984. All of the time from October 29 through November 13 was excludable under *Tibboel*. Now complications set in. The prosecutor could not be expected to respond by November 9 to motions filed as late as November 13. The government could have had an extension for the asking—most likely until November 20, a week after Thomas's last motion (November 9, the original date, was a week after Thomas's date), longer if the government had shown need. But the prosecutor did not seek an extension. The prosecutor did nothing until January 4, 1985, when the government filed a six-page response, some four pages of which were devoted to Thomas's objections to the prosecutor's conduct before the grand jury, the only new material in Thomas's motions. The response attached the magistrate's recommendation of August 1 and the judge's decision of September 20. On January 7, 1985, the judge summarily denied Thomas's motions, and the trial began on January 15. When did the period of exclusion stop?

The prosecutor insists that the time remained excludable until January 7, when the judge denied the motion. As the prosecutor sees things, the entire time was a reasonable period in which to decide the motion. The judge did not see it this way; he acted with dispatch once the prosecutor responded. If the entire period were excluded, a prosecutor could obtain indefinite exclusions of time by the expedient of not responding to frivolous motions. That would undercut the structure of the Speedy Trial Act.

The correct answer, we conclude, is that the motion must be deemed "under advisement" as soon as the prosecutor's response was due, no matter when the prosecutor filed. Section 3161(h)(1)(F) limits pre-advisement time to the date of the hearing or, if there is no hearing, for a "prompt" time. It is not a "prompt" disposition if the prosecutor takes more time than the briefing schedule contemplates. The House report on the original Act states that the advisement time now covered by §3161(h)(1)(J) begins "after

all oral argument is heard and all briefs have been submitted on the matter." H.R. Rep. No. 93-1508, 93d Cong., 2d Sess. 33 (1974). The committee did not consider what would happen if the government neglected to submit its brief. But the Judicial Council of the Second Circuit addressed this question in a set of guidelines that were highly influential when the Act was amended in 1979. These guidelines, which were reprinted in the hearings and the subject of favorable reference in the committee reports, state that the time excluded by §3161(h)(1)(F) (the pre-advisement time) runs until "the date of oral argument (or the *due date* of any post-argument submission), or, if there is to be no oral argument, the *due date* of the reply papers." Judicial Council Speedy Trial Act Coordinating Committee, *Guidelines Under the Speedy Trial Act* (1979), reprinted in *The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 386, 398-99 (emphasis added). The due date rule is consistent with the Act. It fixed an easily ascertained time to shift the case to the "advisement" exclusion of §3161(h)(1)(J), yet it preserves flexibility of the parties to seek additional time (to extend the due date) if more is necessary.

Yet what was the prosecutor's due date? We have explained why the actual due date of November 9 cannot be right; Thomas was not done filing motions until November 13. It is therefore appropriate to treat the prosecutor's due date as November 20, one week afterward, the same seven days the prosecutor had in the original schedule. On November 20 the 30 days provided by §3161 (h)(1)(J) began to run; this exclusion ended on December 20. Because Thomas made only one new motion, the 30 days is an outer limit. See *Janik, supra.* Maybe only three days, the amount the judge actually took, should be excluded. There is no reason to extend the time on account of any difficulty. The bulk of the motions had been made and rejected before, and the judge ultimately rejected all out of hand. Nothing else happened until the trial began, so the period between December 20 and January 15 is not excludable.

To add up the time that counts: March 26 to April 9 is 15 days; August 1 to August 13 is 12 days; September 12 to October 29 is 47 days; December 20 to January 15 is 26 days. That is a total of 100 days. The Act allows only 70. The convictions on counts 1 to 3 must be reversed under 18 U.S.C. §3162(a)(2). As in earlier cases, we leave to the district court the initial decision whether the counts should be dismissed with or without prejudice.

Unfortunately, the reversal of these counts disrupts the district judge's sentencing scheme. Thomas was convicted on seven counts, five with a maximum of one year's imprisonment and two with a maximum of three years' imprisonment. The district court gave Thomas one year on each count but made counts 1 and 2, 4 and 5, and 6 and 7 concurrent, each pair of sentences to run consecutively with the other pairs. The addition of count 3 as another consecutive sentence produced a total of four years' imprisonment. The reversal of counts 1 to 3 would reduce the sentence from four years to two, and it would reduce the fine from $22,000 to $12,000. The maximum sentence on the four counts we have affirmed is eight years' imprisonment and a fine of $30,000. We therefore vacate the sentences on counts 3 to 7 and remand for resentencing. See *Pennsylvania v. Goldhammer*, 106 S. Ct. 353 (1985); *United States v. Jefferson*, 760 F.2d 821 (7th Cir.), *vacated*, 106 S. Ct. 41 (1985), *on remand*, 782 F.2d 697 (7th Cir. 1986).

The judgments on counts 1 to 3 are reversed and the case is remanded with instructions to dismiss the indictment on these counts. The judgments on counts 4 to 7 are vacated and the case is remanded for resentencing on these counts.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—WITH ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 17, 1986.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. THOMAS F. FAIRCHILD, *Senior Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 85-2120 vs.

KENNETH L. THOMAS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 84 CR 222—**Thomas R. McMillen,** *Judge.*

This cause came before the Court for decision on the record from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgments on counts 1 to 3 are REVERSED and the case is REMANDED with instructions to DISMISS the indictment on these counts; the judgments on counts 4 to 7 are VACATED and the case is REMANDED for resentencing on these counts, in accordance with the opinion of this Court filed this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 6, 1986.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. THOMAS F. FAIRCHILD, *Senior Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 85-2120 vs.

KENNETH L. THOMAS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 84 CR 222—**Thomas R. McMillen,** *Judge.*

ORDER

Defendant-appellant filed a petition for rehearing and suggestion of rehearing en banc on May 14, 1986. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges

on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

The penultimate paragraph of the opinion is amended to read:

Unfortunately, the reversal of these counts disrupts the district judge's sentencing scheme. Thomas was convicted on seven counts, each with a maximum of one year's imprisonment. The district court gave Thomas one year on each count but made counts 1 and 2, 4 and 5, 6 and 7 concurrent, each pair of sentences to run consecutively with the other pairs. The addition of count 3 as another consecutive sentence produced a total of four years' imprisonment. The reversal of counts 1 to 3 would reduce the sentence from four years to two, and it would reduce the fine from $22,000 to $12,000. The maximum sentence on the four counts we have affirmed is four years' imprisonment and a fine of $52,000 ($25,000 on each count of failure to file a return and $1,000 on each count of filing a false withholding certificate). We therefore vacate the sentences on counts 3 to 7 and remand for resentencing. See *Pennsylvania v. Goldhammer*, 106 S. Ct. 353 (1985); *United States v. Jefferson*, 760 F.2d 821 (7th Cir.), *vacated*, 106 S. Ct. 41 (1985), *on remand*, 782 F.2d 697 (7th Cir. 1986).

APPENDIX C

DEFENDANT'S PROPOSED DEFENSE INSTRUCTIONS

Mr. Thomas has testified as to his beliefs concerning the filing of income tax returns and the filing of exempt Forms W-4. If you find that these beliefs were the result of a good faith misunderstanding of the law or were the result of negligent or inadvertent conduct by Mr. Thomas, then you must find Mr. Thomas not guilty.

If you believe that the reasons cited by the defendant for not filing income tax returns and for filing exempt Forms W-4 were given in good faith and were based upon his actual belief, you should consider that in determining whether or not his failure to file income tax returns and his filing exempt Forms W-4 was willful.

C.3

The requirement of an offense committed "willfully" is not met if a taxpayer has relied in good faith on a prior decision of the Supreme Court of the United States.

APPENDIX D

TRIAL COURT'S SUA SPONTE MODIFICATIONS OF DEFENDANT'S PROPOSED INSTRUCTIONS

Defendant has testified as to his beliefs concerning the filing of income tax returns and the filing of exempt Forms W-4. If you find that these beliefs were the result of a good faith misunderstanding of the law and that his good faith was reasonable, then you must find Mr. Thomas not guilty.

Alternatively, if you find that his conduct was negligent or inadvertent, then you must also find him not guilty.

D.2

The requirement that an offense be committed "willfully" is not met if a taxpayer in fact relied in good faith on a prior decision of the Supreme Court of the United States which was known to him and if his reliance was reasonable.